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WORLD COURT AND INTERNATIONAL LAW

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WORLD COURT AND INTERNATIONAL LAW

A NEW MOVEMENT to promote the rule of law among nations appears to be making some headway in this country despite, or because of, the growing part played by force and threats of force in world affairs. President Eisenhower observed in his State of the Union message last January that all peoples were "sorely tired of the fear, destruction, and the waste of war" and were seeking "to replace force with a genuine rule of law among nations." The President said it was his purpose, during the final two years of his administration, to intensify efforts toward this end. Measures to be proposed later would include "a re-examination of our own relation to the International Court of Justice."

Vice President Nixon, taking up the subject in an address before the Academy of Political Science at New York on April 13, declared that if the "sword of annihilation" was ever to be "removed from its precarious balance over the head of all mankind," some more positive courses of action than massive military deterrence "must somehow be found." The primary problem, Nixon said, was "not the creation of new international institutions but the fuller and more fruitful use of the institutions we already possess."

Nixon's Advocacy of Wider Utilization of Court

The International Court of Justice, better known as the World Court, was cited by the Vice President as an international institution which could "profitably be employed in a wider range of cases than is presently done." He pointed out that this country bore major responsibility for the Court's small case load. By reserving the right to make its own decision as to whether a case fell exclusively within the domestic jurisdiction of the United States, and therefore outside the jurisdiction of the World Court, it had encouraged other nations to adopt similar reservations. Nixon said the administration now proposed to reverse the process. It would ask Congress to modify the original

reservation in the "hope that, by our taking the initiative in this way, other countries may be persuaded to accept and agree to a wider jurisdiction of the International Court."

The Vice President agreed that disputes regarding domestic matters must remain permanently within the jurisdiction of domestic courts, and that only matters essentially international in character should be referred to the World Court. But he felt there were various fields in which the services of the Court might be increasingly utilized. Spread of private foreign investment and of private and public development plans abroad was a source of economic disputes which might well be submitted to international adjudication. Nixon suggested specifically that provisions should be included, not only in future economic agreements between nations but also in political agreements, (1) requiring submission to the World Court of disputes over interpretation of their terms and (2) binding the parties to accept the decision of the Court.

Terms of Reservation on Domestic Questions

Meanwhile, Congress is still waiting for the legislative recommendations which the Vice President said in mid-April the administration would submit shortly. What is involved is an amendment, proposed by former Sen. Tom Connally (D-Texas), then chairman of the Senate Foreign Relations Committee, and adopted by a vote of 51 to 12, to a resolution in 1946 giving Senate consent to acceptance by the President of the so-called optional clause of the Statute of the International Court of Justice. A nation subscribing to the optional (compulsory jurisdiction) clause agrees that the Court shall have jurisdiction in specified classes of cases to which it is a party, provided that the other party accepts the same obligation. The clause provides that "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

The Senate resolution stipulated that acceptance of the optional clause should not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States." The Connally amendment added the words "as determined by the United States." The effect was virtually to give with one hand and take

away with the other. By insisting that a dispute was essentially of a domestic nature, and persisting in that contention even if the Court decided otherwise, the United States to all intents and purposes could nullify its acceptance of the compulsory jurisdiction clause.

Although the administration has not yet offered a modification of the Connally amendment, a pending resolution by Sen. Hubert H. Humphrey (D-Minn.) would delete the phrase "as determined by the United States." Humphrey said when he introduced the resolution on March 24 that it was unfortunate that the United States had "created one of the major roadblocks to an effective International Court of Justice." He voiced the belief that the time was "long overdue for the Senate to remove this reserve clause." [1]

Bar Association Campaign to Strengthen Court

Removal of the Connally amendment is the first objective of a program advanced by the American Bar Association's Committee on World Peace Through Law to strengthen the World Court and other international legal machinery. Charles S. Rhyne, former A.B.A. president who is chairman of the committee, said in a speech at Washington, D. C., March 10:

> I urge as a program for our 1959 U.N. leadership with respect to the International Court of Justice that: (1) The U.S. Senate be urged to remove from the Connally reservation the words "as determined by the United States of America"; (2) the U.N. Court be urged to move to U.N. headquarters in New York; (3) the U.N. Court be urged to announce that henceforth all complaints will be heard in or near the country or countries where they arise.

In agreement with Nixon and Humphrey, the A.B.A. maintains that the Connally amendment has been a major factor in reducing the World Court's prestige and in holding down its business to decision of only ten cases and rendering of ten advisory opinions in the course of a dozen years. Only 34 of the 82 members of the United Nations, with Liechtenstein and Switzerland, have accepted the compulsory jurisdiction of the Court, and 13 of the 36 states attached reservations to their acceptance. France and Pakistan virtually copied the American reservation, and five other countries made reservations in similar terms.

[1] The Humphrey resolution simply repeats the 1946 resolution without the words added by the Connally amendment. As a resolution of advice and consent, it would have effect only if the President chose to withdraw this country's original acceptance of the optional clause and re-accept the clause under the new terms.

The second and third Bar Association proposals for strengthening the International Court—to move it to New York and to hear complaints in the countries where they arise—are both aimed at making justice through this international instrumentality more accessible. Some lawyers think that lack of recourse to the Court is due to some extent to its remoteness from non-European countries; to the cost of transporting agents, lawyers, experts and witnesses to the Netherlands; and to the feeling in some quarters that the Court as a whole does not have sufficient understanding of the special problems and diverse systems of law of various regions of the world. The A.B.A. has suggested that:

> The Court might exercise its power under its Statute to establish chambers for particular cases, to assign to these chambers judges having the same background of law and traditions as the parties, and to direct these chambers to sit at places convenient for the parties. It might also exercise its power under the Statute to establish chambers for classes of cases in such a way as to serve the convenience of states in specified regions and to assure those states that their disputes among themselves would be decided by judges having the same background of law and traditions as the parties.[2]

Up to now the World Court has sat only at The Hague, where it maintains headquarters in the Palace of Peace, built early in the century with the aid of a large donation by Andrew Carnegie to house the Permanent Court of Arbitration.

National Sovereignty and Court's Jurisdiction

While the United States was a relatively weak power, it was prone to support the principle of compulsory jurisdiction for international tribunals. But at the conference in San Francisco at which the Statute of the International Court of Justice was drafted in 1945 as an integral part of the Charter of the United Nations, this country joined the other great powers in opposing extension of mandatory jurisdiction to the Court even in classes of disputes defined as legal or justiciable. Hence the compulsory jurisdiction clause of the statute was made optional. The three great powers of the West later accepted the clause, but only with reservations. The Soviet Union held to the position that it would not allow itself to be bound by decisions of an international organization which could not be vetoed so

[2] American Bar Association, *Working Papers on the Rule of Law Among Nations* (1959), p. 32.

long as a majority of states, or a majority of judges in the case of a court, represented a political philosophy different from its own.[3]

No Soviet bloc country has accepted the compulsory jurisdiction of the Court even with reservations. As a result, four cases involving American military aircraft forced down by Red planes had to be dismissed without decision when the accused countries—Czechoslovakia and Hungary in one case each and the Soviet Union in two cases—objected to their consideration.

The United States has been the objector in the celebrated Interhandel case. Switzerland contended before the World Court in that case that stock of the General Aniline and Film Co., seized by this country during World War II as an enemy asset, belonged to the Swiss firm of Interhandel. The United States, which had insisted all along that Interhandel was a front for the I. G. Farben Co. of Germany, maintained before the Court last November that the question at issue was essentially domestic and that, in any case, Interhandel had not exhausted opportunities for relief in American courts.

In its ruling, March 21, 1959, the World Court refused to accept the contention that the matter was domestic; on the contrary, it said that a question of international law had been raised by the Swiss contention that Interhandel was a legitimate company domiciled in a neutral country. The Court ruled also, however, that Interhandel had not exhausted the remedies available to it in American courts. The United States, therefore, was not forced to take the step, open to it under the Connally reservation, of refusing to accept the Court's ruling on the jurisdictional question. But that presumably will be the outcome of any Swiss attempt to pursue the matter further in the World Court.

The Court has ruled that in cases involving a party or parties which have made reservations in accepting its jurisdiction, a principle of reciprocity shall apply which in effect limits the Court's jurisdiction to the "lowest common denominator." If the United States, for example, should institute action against a country which had accepted the Court's compulsory jurisdiction without reservation, that country nevertheless would be entitled to claim the privilege which

[3] Oliver J. Lissitzyn, *The International Court of Justice* (1951), pp. 63-64.

the United States enjoys of deciding for itself that the matter in question is of essentially domestic concern and not subject to World Court jurisdiction. If each country has made a reservation, the reservation which imposes on the Court the narrower limits of jurisdiction shall prevail. Thus, as a committee of the international law division of the American Bar Association pointed out last year, "the reservation can 'cut both ways' so to speak, and returns to haunt the state adopting it."

A statement of reasons underlying the refusal of strong nations to go beyond certain limits in agreeing to international adjudication of disputes to which they are parties was contained in a British memorandum of 30 years ago.

> It is because it is so generally felt that there are some questions—justiciable in their nature—which no country could safely submit to arbitration that it has been usual to make reservations limiting the extent of the obligation to arbitrate. These limitations may vary in form, but their existence indicates the consciousness on the part of governments that there is a point beyond which they cannot count on their peoples giving effect to the obligations of the treaty.[4]

The United Nations, like the League of Nations before it, was founded on the concept of the sovereign equality of nations large or small. As an organ of the United Nations, the World Court reflects this concept. Its primary function is to interpret and apply principles of international law in rendering judgment on disputes between states that are susceptible to legal process, but it lacks any power to enforce its decisions.

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[4] Memorandum to the Committee of Arbitration and Security of the Preparatory Commission on Disarmament, League of Nations *Official Journal*, May 1928, p. 696, quoted by Percy E. Corbett, *Law in Diplomacy* (1959), p. 178.

Development of International Courts

ARBITRATION and judicial settlement are closely allied methods for peaceful resolution of international disputes. An arbitral tribunal, in distinction to a court, is organized to pass on a particular dispute. The parties to the dispute, in addition to selecting the arbitrators, agree in advance to accept their award. J. L. Brierly, British authority on international law, has explained: "An arbitrator is a judge, although he differs from the judge of a standing court of justice in being chosen by the parties, and in the fact that his judicial functions end when he has decided the particular case for which he was appointed. . . . Arbitrators and judges are alike bound to decide according to rules of law; neither possess a discretionary power to disregard the law and to decide according to their own ideas of what is fair and just." [5]

Arbitration Treaties and Hague Conventions

After the rise of the modern state system, efforts to settle international disputes on the basis of law began with establishment of arbitration procedures.[6] The United States and Great Britain took the lead in resorting to international arbitration to settle disputes that had not yielded to negotiation. Jay's Treaty, signed at London in 1794, provided for arbitration by mixed commissions of American spoliation claims against Great Britain, of certain British claims against the United States, and of boundary disputes on the northeast and northwest frontiers of this country.

The example set later by the United States and Britain in submitting the Alabama Claims to arbitration in 1871 stimulated wide activity in the field of international arbitration. The Alabama Claims involved depredations on American shipping during the Civil War by the *Alabama* and other Confederate war vessels obtained in England in purported violation of British neutrality laws. A five-man arbitral tribunal, composed of American, British, Brazilian, Italian, and Swiss members, awarded the United States an indemnity of $15.5 million payable in gold.

The Hague Conference of 1899, called by Czar Nicholas

[5] J. L. Brierly, *The Law of Nations* (1955), p. 274.

[6] "Arbitration was a fairly frequent method of settling international disputes in medieval times, but . . . it fell into disuse."—*Ibid.*, p. 275.

II of Russia to seek "a universal peace and reduction of the intolerable burdens imposed on all nations by the excessive armaments of today," recorded its chief accomplishment in measures to facilitate international arbitration. It drew up a Convention on the Pacific Settlement of International Disputes which codified the law and practice of arbitration and provided for organization of a Permanent Court of Arbitration. A second Hague Conference in 1907 revised the convention and strengthened the court. But as an American international jurist has pointed out: "The Permanent Court of Arbitration is hardly more than a method and a procedure. It is not a *permanent* court, and in fact it is not even a *court*." [7] There is a permanent panel of arbitrators, but an arbitral board has to be formed anew for each case.

An attempt to establish a standing International Court of Arbitral Justice, made at the second Hague Conference with the support of the American delegates, failed because large and small nations were unable to agree on a method of selecting judges. The 1907 conference provided conditionally for creation of an International Prize Court, but the projected tribunal never came into being. An indirect result of the Hague conferences was the establishment of a Central American Court of Justice by the five countries of that region. This first true international court of justice functioned from 1908 to 1918. The Hague Convention on the Pacific Settlement of International Disputes attempted to clarify the distinction between justiciable and non-justiciable disputes. Justiciable disputes were described as "differences of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact." [8]

United States and the First World Court

The next major step to organize machinery for judicial settlement of disputes between nations was taken after World War I. The Permanent Court of International Justice, whose creation was provided for by the Covenant of the League of Nations, was established in 1921 by a treaty

[7] Manley O. Hudson, *International Tribunals* (1944), p. 8. The Permanent Court of Arbitration is still in existence, but about the only duty it now performs is to nominate judges of the International Court of Justice.

[8] Convention on the Pacific Settlement of International Disputes, signed at the Hague on July 29, 1899, Art. 9; Convention on the Pacific Settlement of International Disputes, signed at the Hague on Oct. 18, 1907, Art. 9.—Quoted by Lincoln Bloomfield, "Law, Politics and International Disputes," *International Conciliation*, January 1958, p. 265.

commonly called the Statute of the Court. The United States never became a party to the statute, though four American citizens served at one time or another as judges of the first World Court.[9]

The United States put its name to the protocol of signature, and President Harding in 1923 asked the Senate to consent to ratification. A resolution to that effect was voted three years later, but the Senate made ratification conditional on acceptance of five reservations by all members of the Court. It stipulated also that American adherence was not to include acceptance of the optional clause for compulsory jurisdiction. The only one of the Senate reservations which caused real difficulty, in subsequent negotiations with other Court members, was a proviso that the tribunal should not, without the consent of the United States, entertain any request from the Council or Assembly of the League of Nations for an advisory opinion on any question in which this country claimed an interest. Although the statute of the Court was revised in an effort to accommodate the views of the United States, a second Senate vote on adherence, in 1935, fell short of the two-thirds majority needed for approval.

In the 18 years during which the first World Court sat at The Hague (January 1922 to February 1940), it rendered 32 judgments and 27 advisory opinions. All judgments were faithfully carried out by the states affected. Manley O. Hudson has summed up the record of the tribunal as follows:

> The Court effected a settlement of numerous disputes, each of which was important to the parties and some of which were of wider significance. Through its advisory opinions, also, the Court rendered assistance to the Council of the League of Nations in the latter's efforts to bring about the settlement of various disputes, and helped to solve legal difficulties which arose in the work of the International Labor Organization. . . . The results of the Court's work have been generally hailed with satisfaction throughout the world, and the volumes of its jurisprudence constitute a notable contribution to the development of international law.[10]

When leaders of the Allied nations began to lay plans for international institutions to be set up after World War II, they all agreed that the record of the World Court warranted either its reinstatement or the establishment of a

[9] Manley O. Hudson, Charles Evans Hughes, Frank B. Kellogg, John Bassett Moore.
[10] Hudson, *op. cit.*, p. 11.

new court along the same lines and with the same purposes as its predecessor.

Organization of the Present World Court

The Dumbarton Oaks proposals for world organization called in 1944 for an international court as the principal judicial organ of the projected United Nations organization, and suggested that the statute of the court be incorporated in the U.N. Charter. It was decided at San Francisco to establish a new court rather than to reconstitute the old court. Practical considerations underlay this decision. Neither the Soviet Union nor the United States had ever adhered to the old statute, and it was thought that to give the court a new name might facilitate its acceptance by the U.S. Senate. Actually, with the exception of a few not very important particulars, the statute of the International Court of Justice is identical with the statute of the defunct Permanent Court of International Justice.

Fifteen judges, no two of whom may be nationals of the same state, make up the new tribunal. The statute requires that the Court as a whole represent the main forms of civilization and the principal legal systems of the world. Prospective judges are nominated by members of the national panels of the Permanent Court of Arbitration from among persons who "possess the qualifications required in their respective countries for . . . the highest judicial offices, or are jurisconsults of recognized competence in international law." The statute recommends that each of the national groups making nominations "consult its highest court of justice, its legal faculties and schools of law, and its national sections of international academies devoted to the study of law." From the candidates so nominated, the U.N. Security Council and General Assembly elect the judges for nine-year staggered terms.[11]

The chief difference between the new Court and the old is that the new tribunal is one of the principal organs of the United Nations, while the old Court, though closely connected with the League of Nations, was not an integral part of the League. Article 93 of the U.N. Charter states that "All members of the United Nations are *ipso facto*

[11] Present World Court judges whose terms expire Feb. 6, 1967, come from the following countries: Australia, Nationalist China, Egypt, Greece, Poland; terms expiring Feb. 5, 1964: Argentina, El Salvador, France, Mexico, United Kingdom; terms expiring Feb. 5, 1961: Norway, Pakistan, Soviet Union, United States, Uruguay. The American judge is Green H. Hackworth, former legal adviser to the Department of State.

parties to the statute of the International Court of Justice." Any other country "may become a party to the statute . . . on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."

JURISDICTION OF THE INTERNATIONAL TRIBUNAL

The World Court's jurisdiction, as defined in Article 36 of the statute, "comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Article 36 contains also the optional clause for compulsory jurisdiction, under which states that are parties to the statute may at any time declare that they recognize as compulsory the jurisdiction of the Court in all legal disputes concerning:

a. The interpretation of a treaty.
b. Any question of international law.
c. The existence of any fact which, if established, would constitute a breach of an international obligation.
d. The nature or extent of the reparation to be made for the breach of an international obligation.[12]

A U.S. Senate Committee on Foreign Relations study of the World Court has pointed out:

> The origin of compulsory jurisdiction is to be found in the history of efforts made to provide for obligatory arbitration. Some sort of special agreement between the disputants was nearly always necessary in order to bring arbitration machinery into operation, so that in the last analysis each party to a dispute was in a position to decide for itself whether the agreement to arbitrate was applicable. . . . A foundation was laid for the exercise of compulsory jurisdiction by the previous Court. The actual extent of such jurisdiction, however, remained dependent on the willingness of states to commit themselves in advance to accept the Court's jurisdiction in provisions of treaties and conventions, and to file declarations under the optional clause.[13]

Advisory opinions accord the World Court a second form of jurisdiction. Article 65 of the statute provides that "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request." In some cases advisory opinions rendered by the Court have been disregarded, and its com-

[12] The classes of cases here listed correspond to the definition of "justiciable disputes" worked out by a committee of English jurists in 1919.

[13] U.S. Senate Committee on Foreign Relations, *The International Court of Justice* (Staff Study No. 8, May 1955), pp. 5-6.

petence to render an opinion has also been challenged. For example, in 1947 the General Assembly requested an advisory opinion on whether a U.N. member could make its vote on admission of a new member subject to the condition that certain other states be admitted. The Soviet Union had consistently vetoed Security Council recommendations for admission of a number of states, and said that it would vote in their favor only if the applications of certain other states were approved. The Soviet bloc challenged the Court's competence on the ground that admission of new members was a political, not a legal, question. The Court gave its opinion that only those conditions specified in the Charter should apply in considering admission of new members. The U.S.S.R. nevertheless continued to veto membership applications on other grounds, and a later advisory opinion stated that the Assembly could not admit states to U.N. membership whose applications had not passed muster with the Security Council.

Among cases brought by contending parties, one of the Court's decisions was ignored and a second was complied with only tardily. In a dispute in 1947 between Great Britain and Albania, involving destruction of two British destroyers by Albanian mines in the Corfu Channel, the Court awarded damages to Great Britain but Albania failed to pay. In a dispute between Colombia and Peru concerning diplomatic asylum, more than three years passed before the decision of the Court, handed down in November 1950, was honored.[14]

Court of Europe's Supranational Communities

A trend toward pooling of sovereignty in technical or economic fields, hopefully regarded as a possible forerunner of political union, has emerged in Western Europe. Progress since World War II of the long-standing movement for European unification has resulted in part from the need, intensified by technical advances, to unite in order to survive in the modern world. Specialized international agencies had been established earlier to regulate postal communications, international aviation, and other activities in which the mutual advantage of collective supervision was evident and national sovereignty would not be seriously impaired. But submission by the countries of Western Europe to a measure of supranational authority is something new.

[14] See "Doctrine of Asylum," *E.R.R.*, 1950 Vol. I, pp. 154-156.

Six countries[15] have made a limited surrender of sovereignty to a series of interlocking "communities" which administer specific economic activities under centralized authority. The European Coal and Steel Community, first of the new supranational agencies, had its own Court of Justice from its establishment in 1952 until last autumn, when a new Court of Justice was created to serve jointly the present three communities—Coal and Steel, Common Market (European Economic Community) and Euratom (European Atomic Energy Community).

Vice President Nixon said in his April 13 speech that "There are encouraging signs at least that we are on the threshold of real progress toward . . . the settlement of economic disputes between individuals and between nations." The men who designed the structure of the three European communities recognized a need to formulate rules of law to govern community affairs. What was needed, they felt, was a supreme court, functioning independently of member governments, whose judgments would be final. Every decision handed down by the Coal and Steel Community's Court of Justice in its six years of separate existence was respected.

The present Court of Justice of the communities is the judicial branch of a federal structure. It hears appeals from decisions of the executive bodies of the communities. Such appeals can be entered by the government of a member country, by any of the institutions of the communities, by private firms and associations, or even by individual community officials. The court can act also as an international tribunal to pass on disputes between member nations that concern application of the treaties establishing the communities.

Proposals for Nato and Other Regional Courts

Measures under consideration by the American Bar Association to strengthen the rule of law among nations include a proposal to establish courts for particular regions of the world. It is suggested that the jurisdiction of such courts, inferior to the World Court, might be limited to individual claims of denial of justice. Such claims usually accumulate in foreign offices and constitute continuing occasions for international friction until agreements are

[15] Belgium, France, German Federal Republic, Italy, Luxembourg, Netherlands.

reached for wholesale arbitrations or lump-sum settlements. The A.B.A. has proposed that regional courts be given jurisdiction also over disputes arising out of international transactions between individuals or between governments and individuals.[16]

The United States, Great Britain and the Soviet Union so far have refused to give individuals or private associations direct access to any international authority. Percy E. Corbett, formerly of the Center of International Studies at Princeton, recently commented on this question as follows: "Essentially the British, American and Soviet governments' rejection of private petition springs from the same source. It is an insistence upon state sovereignty in the relations between government and citizen, and a refusal to join in creating an institution that would recognize and implement international personality in the individual. . . . Deplorable delay and confusion result from this principle when individuals suffer denial of justice in a foreign country and must depend for redress upon adoption of their claims by their own governments." [17]

The latest proposal for a regional international court was advanced by Charles S. Rhyne, chairman of the A.B.A.'s World Peace Through Law Committee, at the Atlantic Congress, a gathering of unofficial representatives of NATO countries at London from June 5 to 10. Citing the old Central American Court of Justice and the new Court of Justice of the European communities, Rhyne suggested that NATO establish a court to handle disputes involving foreign investment, patent, copyright and trademark problems and, in general, "denials of state commercial protection to foreign nationals." [18] The congress voted to have a study group look into the proposal.

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[16] The Central American Court of Justice (1908-18) had power to deal with disputes between nations and disputes between governments and private individuals.

[17] Percy E. Corbett, *op. cit.*, pp. 262-263.

[18] *The Times* of London commented on June 6: "It is hard to see that an American idea of having an International Court of Justice for NATO would do much more than detract from the Hague court."

Role of Law in International Relations

THE PRESENT World Court has maintained the high standards of jurisprudence which characterized its predecessor but, with little to do, it has not yet realized its potentialities. The basic causes are to be found in the general attitudes of governments toward the Court, attitudes which have been exacerbated by the East-West tensions in the postwar world.

Observers have criticized the tendency of United Nations organs to interpret obscure or controversial aspects of Charter provisions independently instead of asking the Court for advisory opinions. Failure to request more advisory opinions on legal questions has been attributed to a feeling, on the part of U.N. members, that law has little relevance to the problems involved in maintenance of international peace and security under existing conditions. The world organization's activities in this connection, it has been pointed out, have been concerned chiefly with questions raised by the cold war and by the elemental struggle of Asians and Africans for independence and equality.[19]

Decline of the role played by law in settlement of international disputes has been ascribed also to a general discounting of the value of law and legal procedures in this connection. Another explanation often advanced is that free world nations, while themselves disposed to rely on legal processes, are restrained from doing so by the scorn of Soviet bloc countries for Western traditions of jurisprudence. Communist doctrine holds that international law exists to protect the political, economic and social status quo which Communists are determined to overthrow.

Probably the most fundamental reason for neglect of the World Court is that nations, especially powerful nations, are reluctant to give up in advance, through acceptance of the compulsory jurisdiction of the Court, the right to seek political settlement of an important dispute. Lincoln Bloomfield, of the Center for International Studies of the Massachusetts Institute of Technology, has observed:

> The kind of consensus needed for law to play a fuller role in international affairs is profoundly lacking today, just as it has

[19] L. M. Goodrich and A. P. Simons, *The United Nations and the Maintenance of Peace and Security* (1955), pp. 64-65.

been in the past. As early as 1899, at the first Hague Conference, the delegate of Imperial Russia made the following statement setting forth a rigid concept of national sovereignty and reservation of unilateral rights that has never really been departed from since by any major power: "There is no government which would consent *in advance* to assume the obligation to submit to the decision of an arbitral tribunal every dispute which might arise in the international domain if it concerned the national honor of a state, or its highest interests, or its inalienable possessions."[20]

U.N. Secretary General Dag Hammarskjold, commenting on Vice President Nixon's speech about the World Court, suggested on April 16 that it might be useful to separate the legal and the political aspects of international disputes.

Difficulty of Adjudicating Political Controversies

Legal writers point out that there are significant differences between legal or justiciable disputes and political or non-justiciable disputes. On this point Bloomfield has written:

> Aspirations for a rule of law have failed because they were too pretentious, evaluating incorrectly the true relationship between law and politics in resolving disputes among national political entities. . . . There are two distinct types of international disputes . . . disputes settled according to some law that both parties accepted, and those that, for whatever reason, could not be settled by a court. . . . This distinction . . . has a special relationship to the problem of "peaceful change." . . . At the heart of both issues was the profound dilemma of how to create and apply a reliable world law, and at the same time cope with forceful claims that rejected both that law and the status quo it represented. For such claims were increasingly the source of international disputes that . . . have come to dominate the world scene.[21]

The problem of peaceful change has led some observers to assert that it is more realistic to resort to negotiated settlement of political issues. A judicial determination of a primarily political dispute may not result in a solution of the underlying problem. Law cannot be regarded as a true substitute for force or threat of force, moreover, as long as any government believes that force may assure more complete attainment of its objectives. As it is, some observers feel that it would be disastrous for the World Court to accept jurisdiction in primarily political disputes. In such a case, the party ruled against probably would not observe the decision, and the prestige of the Court would suffer.

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[20] Lincoln Bloomfield, *op. cit.*, p. 311; quoting *The Proceedings of the Hague Peace Conferences: Conference of 1899* (1920), pp. 173-174.

[21] Lincoln Bloomfield, *op. cit.*, pp. 258, 261.

In practice, it would seem that international law has no more than limited usefulness in the critical relationships of nations. The present World Court has handled almost solely cases which have not involved particularly controversial political issues. An exception was the dispute over Iran's nationalization of the Anglo-Iranian Oil Co. in 1951. Great Britain asked the Court to rule that the action violated a provision of the concession agreement forbidding its unilateral annulment. But the Court on July 22, 1952, accepted Iran's contention that the international tribunal did not have jurisdiction. The dispute eventually was settled on a compromise basis, Anglo-Iranian having destroyed the market for Iranian oil by threatening to sue any purchasers of the product of the government company as receivers of stolen goods.[22]

Whether efforts to define and separate legal and political disputes would be worth while is debatable. During the postwar period a number of seemingly justiciable disputes have not been submitted to the World Court because of their political implications. Among such disputes have been those over the validity of Kashmir's accession to India and of Egypt's nationalization of the Suez Canal company, over the status of Formosa and the offshore islands, and over the right of access to West Berlin. Merely to name these disputes is sufficient to demonstrate the virtual impossibility of attempting to settle them by legal processes.

It is asserted in some legal circles that there is no real distinction between legal and political international disputes, and that no quarrel between nations is really justiciable so long as nations are not compelled to submit to legal processes. Though this view is not generally accepted, it has been advanced by some distinguished international jurists: J. L. Brierly, a noted British authority; Hans Kelsen, an American professor; and Hersch Lauterpacht, now British judge at the World Court. They contend that all international disputes are political in the sense that they involve more or less important interests of states, but that all international disputes are legal in the sense that, so long as the rule of law is recognized, they can be settled by the application of legal rules. For there are no gaps in the system of international law taken as a whole; it can provide a solution to any issue submitted to a court. J. L. Brierly has summed up the position as follows:

[22] See "Oil Nationalization," *E.R.R.*, 1951 Vol. II, p. 758.

> International law then is never . . . incapable of giving a decision, on the basis of law, on the respective rights of the parties to any dispute. . . . We must look for the difference between justiciable and non-justiciable disputes elsewhere than in some assumed specific quality which distinguishes that law from other systems. . . . If . . . what the parties seek is their legal rights, the dispute is justiciable; if . . . one of them at least is not content to demand its legal rights, but demands the satisfaction of some interest of its own even though this may require a change in the existing legal situation, the dispute is non-justiciable. It is certain that many disputes, probably most of the serious disputes, of states are of this kind, and this is an important fact in the relations of states, of which, whether we like it or not, we must take account.[23]

International law, compared with national law, is in its infancy, but many persons believe that it will develop even as national law has developed. In a speech at Cambridge, Mass., May 1, 1958, Roscoe Pound, Dean Emeritus of the Harvard Law School, said: "A legal order is the mark of a civilized society. Relations of defense and commercial relations extend the area of civilization. . . . We are coming to have world economic relations which must lead to world ethical and, we may well believe, eventual legal relations—a world-wide civilization."

[23] J. L. Brierly, op. cit., p. 287.